No. 1268

In the Supreme Court of the United States

FRANK A. DUDLEY, CHARLES DOHERTY and RONALD G. WRIGHT, constituting the Stockholders' Protective Committee,

Petitioners,

vs.

CARROLL E. MEALEY, Trustee of Albany Hotel Corporation, Debtor, *et al.*,

Respondents.

In Proceedings for Reorganization of Albany Hotel Corporation Number 32,561

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the Supreme Court of the United States

FRANK A. DUDLEY, CHARLES DOHERTY and RONALD G. WRIGHT, constituting the Stockholders' Protective Committee,

Petitioners,

vs.

CARROLL E. MEALEY, Trustee of Albany Hotel Corporation, Debtor; THE NATIONAL COMMERCIAL BANK & TRUST COMPANY, as Trustee for First and Refunding Bonds of 1939 of Albany Hotel Corporation; THE BONDHOLDERS' 1946 and Refunding Bonds of 1939 of Albany Hotel Corporation; THE BONDHOLDERS' PROTECTIVE COMMITTEE of the First and Refunding Bonds of the Albany Hotel Corporation; FIRST TRUST COMPANY OF ALBANY, Trustee for General Bonds of Albany Hotel Corporation; FIRST TRUST COMPANY OF ALBANY; THE BONDHOLDERS' PROTECTIVE COMMITTEE for General Mortgage Bonds of Albany Hotel Corporation,

Respondents.

In Proceedings for Reorganization of Albany Hotel Corporation, Number 32,561

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit, entered in the above entitled matter on Feb. 15, 1945.

OPINIONS BELOW

The United States District Court for the Northern District of New York rendered no opinion.

The opinion of the Circuit Court of Appeals for the Second Circuit (R., p. 423) is reported in 147 Fed. (2d) 268.

JURISDICTION

The decree of the Circuit Court sought to be reviewed was entered February 15, 1945 (R., p. 432).

The jurisdiction of this Court to review is derived from Section 240 (a) of the Judicial Code, as amended (28 U. S. C. A. § 347).

STATUTES INVOLVED

This is a proceeding for reorganization of a corporation under Chapter X of the Bankruptcy Act, 11 U. S. C. A., §§ 501-676.

STATEMENT

Respondent, Carroll E. Mealey, the reorganization trustee, filed a plan of reorganization, making no provision for stockholders. Petitioners also filed a plan (ff. 64-103), and filed objections to the Trustee's plan, raising the issues that Debtor was solvent and hence provision should be made for stockholders in any plan, and that said Trustee's plan was in fact a proposed sale of Debtor's assets, contrary to the provisions of the Bankruptcy Act and General Orders in Bankruptcy (ff. 59-62).

The District Court approved the Trustee's plan, disapproved petitioners' plan as unfair, inequitable and not feasible and found Debtor insolvent (pp. 109-129).

From this determination petitioners appealed to the United States Circuit Court of Appeals for the Second Circuit.

The Circuit Court affirmed the determination of insolvency but did not pass upon the question of whether the Trustee's plan was, in fact, a proposed sale of Debtor's assets, contrary to the provisions of the Bankruptcy Act and General Orders in Bankruptcy, nor upon the question of whether petitioners' plan was fair, equitable and feasible.

QUESTIONS PRESENTED

1. In determining whether stockholders have an interest in a corporation being reorganized, should not the Court take into consideration the liquidation value of the debtor's assets, irrespective of its history of past earnings when the liquidation value exceeds the debtor's liabilities?

2. In the absence of any definition of insolvency in Chapter X of the Bankruptcy Act, does the definition provided in Chapter I, Section 1, Subsection 19 apply?

3. Debtor never operated the hotel property. In determining the value of debtor's assets, was it proper for the Court to capitalize the earnings of the lessor of Debtor's property and at the same time entirely disregard obvious changes which would substantially increase those earnings?

4. Is the decision of the Circuit Court in conflict with the decisions of the Supreme Court of the United States in *Galveston H. & S. R. Co. v. Texas*, 210 U. S. 217, 226, 28 S. Ct. 638, 52 L. Ed. 1031; *Consolidated Rock Products Co. v. Dubois*, 312 U. S. 510, 525, 526, 61 S. Ct. 675, 84 L. Ed. 982; *Group of Institutional Investors v. Chicago, M., St. P. & P. R. Co.*, 318 U. S. 523, 540, 63 S. Ct. 727, 87 L. Ed. 959?

5. In determining the liabilities of a debtor as a going concern for reorganization purposes, is it proper to accrue real estate taxes? $84,194 of real estate taxes became due Jan. 1, 1944, for the calendar year of 1944. Debtor's solvency was being determined as of Dec. 31, 1943.

6. Can the equity in a debtor's assets be sold to a total stranger to the proceedings under the guise of a plan of reorganization without observing the provisions of the Bankruptcy Act and General Orders in Bankruptcy with regard to sale of property?

REASONS RELIED UPON FOR WRIT

I.

The Circuit Court has decided important questions of federal law which have not been but should be settled by this Court.

In *Consolidated Rock Products Co. v. Dubois*, 312 U. S. 510, and again in *Group of Investors v. Chicago, S. P. & M. R. Co.*, 318 U. S. 523, the Supreme Court has laid down the rule that in reorganization proceedings earning power is the primary criterion of value. Reorganization, of course, presumes a readjustment of liabilities and a continuance of the business. If the undisputed liquidation value of the assets exceeds the liabilities, that excess should belong to the stockholders, regardless of any history of past earnings or possibility of future earnings.

Let us first consider the liabilities. The Circuit Court in its opinion found the liabilities as of Dec. 31, 1943, to be $1,396,393.82

The first argument advanced by counsel was that the foregoing liabilities should be reduced of real estate taxes for the calendar year of 1944, and that if Debtor was being reorganized as a going concern, this liability should not be accrued any more than if Debtor's assets were being sold. Every accepted accounting practice and legal transaction for the sale of property recognizes that taxes are not accrued, but rather are adjusted to the date of closing. Should this not also be true in reorganization proceedings, particularly when the amount involved may cause stockholders to be frozen out?

	$84,194.00	
Furthermore, in the foregoing liabilities is included First and Refunding Bonds of which are actually owned by Debtor and accordingly should be deducted. Subtracting these two items from the foreging leaves a total liabilities of	$15,000.00	$99,194.00
		$1,297,199.82
The Circuit Court found cash and current assets correctly to be which subtracted from the above leaves		207,079.82
		$1,090,120.00

as the value of the land, buildings, furniture, fixtures, etc., and equipment. The lowest value placed upon

the furniture, fixtures, silverware, china, glassware, etc., was (f. 188)	115,010.00
leaving	$975,110.00

as the amount which the fixed assets—land, building and equipment—had to supply in order to render Debtor solvent.

Mr. Toth was hired by the Trustee, sworn and qualified as a hotel accountant (f. 224). He admitted that he was not a hotel operator and insisted he was strictly a hotel accounting specialist (f. 337). He testified that based on the earnings of the hotel from 1937 to 1943 (f. 338), according to the formula used by him, the income did "not support any more than a land value of anywhere from $1,000,000 to $1,200,000 and no other value" (f. 284). He said:

> "I am not talking about vacant land, I am talking about land with a going hotel on it where even if the hotel burned down, the value is still there (f. 299) * * * the land has that value at all times (f. 305) * * * I have used 4% because my capitalization is based on the lowest income, including only one good year—1943" (f. 345).

From the record in this case there is no possible theory upon which any lower valuation could possibly be placed on the land and buildings and equipment.

Mr. Toth's valuation was strictly a liquidation value of the land and buildings. Accordingly, the aggregate liquidation value of Debtor's property exceeded its liabilities by a substantial sum. Should stockholders be deprived of their equity because capitalization of earnings or some other formula results in a different valuation? Did the Supreme

Court in *Con. Rock Prod. Co. v. Dubois* and *Group of Investors v. Chicago, St. P. & M. Ry. Co.*, supra, intend that capitalization of earnings was the only theory upon which equity of stockholders is to be determined? If the actual liquidation value in Debtor's assets exceeds the liabilities should not the stockholders share in that excess? Least of all, why should that excess be turned over to some third person who is not even a party to the proceeding? We refer to Meyer Schine, to whom the Trustee proposes to transfer all of Debtor's assets as a part of his plan.

Even the Circuit Court applied Mr. Toth's formula and said in its opinion:

> "He was calculating upon the value of the land only."

and in using the earnings from 1937 to 1943 that calculation resulted in a value of $1,250,000. If to that valuation is added the current assets and liquidated value of the furniture, placing no valuation whatever on the buildings and equipment, the Debtor is solvent to the extent of $275,000.

Chapter X of the Bankruptcy Act does not provide any definition of insolvency. Section 103 of Chapter X provides:

> "The provisions of Chapter VII of this act shall insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply to proceedings under this chapter."

Thus, for a definition of insolvency under Chapter X we must look to Chapter 1, Section 1, Subdivision 19, which provides:

> "A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property * * * shall not at a fair valuation be sufficient in amount to pay his debts."

We do not believe that *Consol. Rock Prod. Co. v. Dubois* and *Group of Investors v. Chicago, St. P. & Mil. Ry. Co.*, supra, precludes the application of that definition of insolvency. We believe that a "fair valuation" should be made, whether it is based on earnings, liquidation value, or any other theory. If valuation based on capitalization of earnings is to be applied, then it should not be based on the average of the poorest years, nor on earnings of the lessor of Debtor rather than on Debtor. Debtor should not be charged with the shortcomings of the lessor in its operation of the property. Obvious changes which would increase earnings and reduce expenses should have been considered.

Another important question which we believe should be settled by this Court is whether the equity in Debtor's assets can be sold under the guise of a plan of reorganization to a total stranger to the proceedings without observing the provisions of the Bankruptcy Act and General Orders in Bankruptcy with regard to the sale of property.

This plan of reorganization is in substance a sale of Debtor's assets to Meyer Schine, subject to provisions for payment of the first two mortgages and on payment of about 50c on the dollar to the second and third mortgage bondholders. Mr. Schine is not a party interested in these proceedings.

There is nothing in Chapter X of the Bankruptcy Act which permits a trustee to sell a debtor's property without

complying with the usual and recognized practice of bankruptcy sales. Here the Trustee did not even put this hotel up for sale, and so testified (f. 877).

Mr. Udd, being examined on the subject, testified that there were many persons interested in buying this hotel on terms at $1,500,000. The District Court interrupted him, saying: "I wouldn't waste much time on that" (f. 1114). Even the Trustee testified that in his opinion the hotel had a fair value of $1,600,000 (f. 560).

If the mortgages were foreclosed the stockholders would at least have had the benefit of a sale at public auction and if such sale was for the amount of the mortgages, the free assets would have become the property of the stockholders —there being no unsecured creditors of any consequence.

The free assets consist of cash, accounts receivable and inventories having an admitted value of over $200,000.

The stockholders have been deprived of substantial rights. The provisions of the Bankruptcy Act and General Orders in Bankruptcy have not been followed. By its terms, Chapter X of the Act extends no such right to a trustee and we do not believe that Congress so intended.

The stockholders should not be deprived of their equity solely because a third person has offered to the reorganization Trustee a sum of cash to be paid for the surrender of junior mortgage bonds.

II.

The Circuit Court has determined the question of debtor's solvency in conflict with the decisions of this Court in Consolidated Rock Products v. Dubois and Group of Investors v. Chicago, St. P., M. & P. Ry. Co., supra.

The rule as laid down in those cases is:

> "A valuation for reorganization purposes based on earning power requires of course an appraisal of many factors which cannot be reduced to a fixed formula. It entails a prediction of future events. Hence 'an estimate, as distinguished from mathematical certitude, is all that can be made' " (p. 542).

In applying his formula of capitalizing earnings Mr. Toth did not take into consideration any future events or future earnings and refused to make any predictions (ff. 279, 281, 305, 323, 432).

Debtor never operated the hotel property. The hotel was leased to a tenant who was able to survive the entire depression period but went into bankruptcy in 1942.

Contrary to the statement of the Circuit Court, Debtor did meet all of its fixed charges of every name and description to July 1, 1942, and even then it had sufficient cash on hand to continue to meet its fixed charges. In fact, at all times, even now, it has had sufficient cash on hand to pay every cent of its back interest and taxes and still have plenty of working capital. It is only because the First Trust seized a bank deposit of $75,000 that Debtor found itself in reorganization proceedings. The irregularity of

that seizure is covered fully by the Circuit Court's opinion upon this very appeal.

We call attention to only one obvious change which would nearly double the average earnings as used by Mr. Toth in his calculation.

For many years the land and buildings have been assessed for real estate tax purposes at $2,150,000 (f. 291). The Albany tax rate is $40 per thousand. Section 8 of the Tax Law of New York State provides:

> "All real property subject to taxation shall be assessed at the full value thereof."

No one giving any thought to the matter could possibly deny but that this assessment is extremely out of line. This Court will take judicial notice of the fact that the state courts of New York State, upon proper application, would rectify that obviously excessive assessed valuation.

If Mr. Toth's valuation of the land and buildings at $1,200,000 is correct, then what explanation is there for not assuming that a reduction to that amount could be obtained by application to the New York courts? If this is done, the assessed valuation would be cut in half and the taxes accordingly cut in half, which would mean that the net earnings from this property would be $40,000 more.

How did the Circuit Court overlook this obvious injustice? The answer is that it did not hear counsel on the argument, nor did it read petitioners' brief. No mention of this whatever is made in its opinion.

While we do not claim that the New York State courts would cut this assessment in half, certainly there would be a leveling off point in the neighborhood of $1,300,000. That would mean a tax reduction of about $32,000 a year and, accordingly, an increase in the average earnings of $32,000. This in and of itself, upon any theory that the Court desired to capitalize Debtor's earnings, would unquestionably have rendered Debtor solvent.

In applying the rule laid down in *Consolidated Rock Products Co. v Dubois* and *Group of Investors v. Chicago, St. P. & M. Ry. Co.*, supra, the Circuit Court only applied a portion of the rule. That part of the rule which says—"It entails a prediction of future events"—it did not apply, nor did the District Court.

III.

The decision of the Circuit Court is erroneous on its face.

Neither *Consolidated Rock Products Co. v. Dubois* nor *Group of Investors v. Chicago, St. P. & M. Ry. Co.*, supra, specify what formula of capitalization of earnings is to be used. The formula used by Mr. Toth (Trustee's witness) is a novel one indeed. He examined the books of Debtor and Debtor's lessee from 1937 through 1943. Debtor never operated the hotel. Hence, for the earnings from the hotel operations Mr. Toth had to resort to the lessee's books.

He then prepared an exhibit, eliminated non-recurring items, made certain adjustments, and then averaged the net earnings, going back each year from 1943; first two years; then three years; then four years; then five years;

then six years; then seven years, and said this average was never less than $43,000 and never more than $49,000 (ff. 282, 393). He then capitalized that average at 4% and arrived at the conclusion that that income "does not support any more than a land value of anywhere between $1,000,000 and $1,200,000, and no other value" (f. 284).

Pressed for further explanation, he said:

> "I am not talking about vacant land, I am talking about a land with a going hotel on it where even if the hotel burns down, the value is still there (f. 299) * * * the land has that value at all times (f. 305) * * * I have used 4% because my capitalization is based on the lowest income, including only one good year, 1943 * * *" (f. 345).

The Circuit Court adopted Mr. Toth's value and then said:

> "He was calculating upon the value of the land only."

The Circuit Court said, using Mr. Toth's formula, that that value was $1,250,000.

The other experts were petitioners', who based their capitalization of earnings upon entirely different theories and, we believe, according to the usual and accepted methods. Using those methods valuations were from $1,500,000 to $2,000,000.

How does the Circuit Court arrive at its conclusion that the land and buildings were worth any less than the value Mr. Toth placed upon the land of $1,250,000?

The Circuit Court said: "That made debtor solvent." How then is Debtor rendered insolvent? The Circuit Court said: "Mr. Toth took the 4% because the value of the hotel was all in the land." What difference does it make whether the value is all in the land or in the land and buildings if the land alone has a value of $1,200,000, leaving no value in the buildings? In either case the value is sufficient to render Debtor solvent. The decision of the Circuit Court is palpably wrong on its face.

IV.

The Circuit Court has so far departed from the accepted and usual course of judicial procedure as to call for an exercise of this Court's power of supervision.

At the beginning of the argument on this appeal, counsel for petitioners was asked by the presiding Judge if there were experts on both sides. Having replied in the affirmative, the presiding Judge admonished counsel and then went into a huddle with the two associate Judges, at the same time directing counsel to proceed with his argument.

Petitioners verily believe that counsel was not heard. The points urged by counsel on his argument and in his brief were not passed upon by the Circuit Court. It is recognized by all courts as the fundamental basis of our judicial proceedings that counsel is entitled to be heard, and to "be heard" means something more than merely a statement made to the four walls of a court room. In the eyes of a practitioner it means that the court gives attention to what counsel is saying. On this appeal counsel for petitioners was not granted that attention.

V.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

FRANK A. DUDLEY, CHARLES DOHERTY and RONALD G. WRIGHT, constituting the Stockholders' Protective Committee,
Petitioners,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

NO. 1268

FRANK A. DUDLEY, CHARLES DOHERTY and RONALD G. WRIGHT, constituting the Stockholders Protective Committee,

Petitioners,

against

CARROLL E. MEALEY, as Trustee of Albany Hotel Corporation, Debtor; THE NATIONAL COMMERCIAL BANK AND TRUST COMPANY of Albany, as Indenture Trustee for Debtor's First and Refunding Bonds of 1939, and its First and Refunding Bonds of 1946; BONDHOLDERS PROTECTIVE COMMITTEE for the holders of Debtor's First and Refunding Bonds of 1946; FIRST TRUST COMPANY of Albany, as Indenture Trustee for Debtor's General Mortgage Bonds and its 7% Gold Bonds; GENERAL MORTGAGE BONDHOLDERS PROTECTIVE COMMITTEE; and FIRST TRUST COMPANY of Albany,

Respondents.

In Proceedings for the Reorganization of Albany Hotel Corporation, No. 32,561

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 1268

FRANK A. DUDLEY, CHARLES DOHERTY and RONALD G. WRIGHT, constituting the Stockholder's Protective Committee,

Petitioners,

against

CARROLL E. MEALEY, as Trustee of Albany Hotel Corporation, Debtor, et al.,

Respondents.

In Proceedings for the Reorganization of Albany Hotel Corporation, No. 32,561

BRIEF OPPOSING WRIT OF CERTIORARI

This brief is respectfully submitted on behalf of all Respondents.

Statement

Albany Hotel Corporation, the Debtor, is the owner and operator of the Ten Eyck Hotel in the City of Albany, New York. On March 17, 1943, The National Commercial Bank and Trust Company of Albany, as Indenture Trustee

under the mortgage given to secure the Debtor's first and refunding mortgage bonds, instituted suit in the Supreme Court of the State of New York, County of Albany, to foreclose said mortgage, and had a Receiver appointed. On March 20, 1943, the Debtor filed its petition under Chapter X of the Bankruptcy Act, seeking leave to effect a reorganization. On the same day the District Court for the Northern District of New York made its order approving said petition as properly filed, and appointed the Respondent, Carroll E. Mealey, Reorganization Trustee. His appointment was subsequently made permanent.

On or about January 12, 1944, the Reorganization Trustee submitted a proposed reorganization plan. Thereafter the petitioners filed a proposed plan. The record filed by petitioners with this Court deals almost exclusively with the testimony taken before the District Court in connection with said original plans. The hearings convinced the Trustee that neither plan was feasible and could not properly be approved by the District Court. Accordingly the Trustee, on or about April 29, 1944, submitted an amended plan. Said amended plan made no provisions for stockholders.

After further hearings the District Court made its order, dated June 13, 1944, finding the Debtor insolvent (R. 39), finding the plan filed by the petitioners (the stockholders) neither fair, equitable nor feasible (R. 39), and approving the amended plan filed by the Trustee (R. 39). The petitioners appealed to the Circuit Court of Appeals from said order (R. 44).

On January 5, 1945, the Circuit Court handed down its decision, accompanied by an opinion by Judge Learned Hand evidencing a most painstaking study not only of the briefs of counsel but of the printed record and the several exhibits handed up to the Court upon the argument but not contained in the printed record, wherein after reviewing the

facts and figures at length (R. 424), he says: "*the debtor was plainly insolvent.*" (R. 426.) (Italics ours.) It remanded the cause to the District Court for further proceedings not inconsistent with its opinion (R. 432).

Petitioners in their petition state (page 3) that: "Debtor never operated the hotel property." This same statement is reiterated at page 10. The fact is that at all times since built the hotel has been owned by Debtor. It was operated by The Ten Eyck Co., Inc., as lessee until the bankruptcy of said lessee in 1942, at which time the Debtor took over the operation and so continued until the reorganization proceeding (R. 254, 255, 256). During the entire operation, both by The Ten Eyck Co., Inc., and Debtor, United Hotels Company of America, Inc., managed the hotel under a series of management contracts. Each of said three corporations had a Board of five Directors. The petitioners, Frank A. Dudley, Charles Doherty and Ronald G. Wright constituted a majority of each of said three Boards. In fact, therefore, there has been no actual change in control from the date the hotel was opened for business in 1898, down to the present time.

POINT I.

The question of insolvency is one of fact not reviewable by this Court.

The District Court has found the Debtor insolvent. Its said finding has been unanimously approved by the Circuit Court.

Whether the Debtor was and is insolvent is a question of fact not open to review in this Court.

Kaufman v. Treadway, 195 U. S. 271, 273.

Citing:

Hedrick v. Atchison, Topeka & Santa Fe Ry. Co., 167 U. S. 673, 677.

Bement v. National Harrow Co., 186 U. S. 70, 83.

Jenkins v. Neff, 186 U. S. 230.

POINT II.

The decision of the Circuit Court is not in conflict with the decisions of this Court.

The rule enunciated by this Court in

Galveston H. & S. R. Co. v. Texas, 210 U. S. 217,

Consolidated Rock Products Co. v. Dubois, 312 U. S. 510,

Group of Institutional Investors v. Chicago, M., St. P. & P. R. Co., 318 U. S. 523,

is the very rule which the lower courts applied.

Reference to the opinion of the Circuit Court (R. 424), shows that it went into great detail in its statement respecting the assets and liabilities of the Debtor and gave only proper weight to the lack of earning power demon-

strated by the history of the hotel from 1931 to 1942, inclusive, all in conformity with the aforesaid decisions of this Court.

It is, however, proper to point out that the attempt of petitioners at pages 4 and 5 of their petition to exclude from the Debtor's liabilities $84,190.00 of real estate taxes is predicated upon a misstatement of fact. They say that said "real estate taxes became due Jan. 1, 1944 for the calendar year of 1944. Debtor's insolvency was being determined as of Dec. 31, 1943." These taxes, although payable January 1, 1944, became a lien on the real estate during the year 1943 and are based on the 1943 assessment, and therefore cannot be ignored in determining the Debtor's net worth as of December 31, 1943.

Nor can there be excluded from the Debtor's liabilities the $15,000.00 of first and refunding mortgage bonds which, although legal title thereto was in the Debtor, cannot be considered an asset of the Debtor since they were all pledged as collateral security (R. 11).

Nor can there be added to the value of the land and buildings, as petitioners attempt to do at page 6 of their petition, the $115,010.00 appraised value of the movable furniture, silverware, etc., since its value was already taken into consideration by Mr. Toth in arriving at the going value of the Debtor (R. 118).

POINT III.

The fact that the plan contemplates a sale to a new corporation is expressly within the contemplation and provisions of Chapter X.

A sale of the assets of a Debtor corporation to a new corporation is expressly sanctioned by Chapter X as it was by former Section 77B and has been repeatedly approved by the courts.

Section 216 provides:

> "A plan of reorganization under this chapter * * * (10) shall provide adequate means for the execution of the plan, which may include: * * * *the sale or transfer of all or any part of its property to one or more other corporations theretofore organized or thereafter to be organized;* * * * the sale of all or any part of its property, either subject to or free from any lien, at not less than a fair upset price and the distribution of all or any assets or the proceeds derived from the sale thereof, among those having an interest therein; * * * (italics ours).

Bankruptcy Act, Section 216; 11 U. S. C. A., Sec. 616.

Matter of Central Funding Corporation; Union Trust Company of Maryland v. Wagner (C. C. A. 2d) 75 F. (2d) 256.

In re Porto Rican Tobacco Co. (C. C. A. 2d) 112 F. (2d) 655.

In re Englander Spring Bed Co. (D. C. N. Y. 17 F. Supp. 15, aff'd. without opinion (C. C. A. 2d) 86 F. (2d) 998.

Continental Insurance Company v. Louisiana Oil Refining Co. (C. C. A. 5th) 89 F. (2d) 333.

POINT IV.

The judgment which petitioners desire to review is not a final judgment and should not be reviewed by this Court.

The judgment in question remanded the reorganization proceeding to the District Court for further proceedings not inconsistent with its opinion (R. 431, 432). This Court has repeatedly said that except in extraordinary cases a writ of certiorari is not issued until final decree, and that the circumstance that the decision of the Circuit Court of Appeals is not a final one is a fact which standing alone may furnish sufficient ground for the denial of the application.

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U. S. 251.

Toledo Scale Co. v. Computing Scale Co., 261 U. S. 399.

POINT V.

The petition for a writ of certiorari should be denied.

Dated, May 23, 1945.

Respectfully submitted,

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